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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

MARICOPA COUNTY LIBERTARIAN
PARTY,

Plaintiff,

v.

MARICOPA COUNTY; et al.,
Defendants.

Case No. CV2021-002205

**ARIZONA REPUBLICAN PARTY'S
BRIEF AMICUS CURIAE**

“Trust, but verify.”

-Ronald Reagan (Republican and 40th President of the United States)

“Secrecy breeds mistrust among the public, an assumption that the government is doing things it shouldn't.”

-Reason Magazine (a Libertarian publication)

Republicans and Libertarians are rivals in the field of electoral politics but stand united in their belief that government transparency is essential to a functioning society. Like the Libertarian Party, we believe that political parties have an important role to play when it comes to overseeing those who administer our elections. The Arizona Republican Party therefore submits this brief, amicus curiae, to voice both concern over the County's refusal to comply with the laws governing this oversight function and support for the Libertarian Party's request for relief.

I. The importance of oversight by political parties.

Political parties fill a unique role in our system of government. Though private membership organizations, government officials nonetheless have certain “duties” to a recognized party’s authorized representatives. *State Libertarian Party v. Schmerl*, 200 Ariz. 486, 490, 28 P.3d 948, 952 (App. 2001); *See also Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 150, 291 P.3d 342, 347 (2013) (recognizing political parties enjoy “favored status” under various election-related laws). These duties are set forth in statutes such as those at issue in this litigation, which grant party representatives specific rights to exercise oversight over the County’s administration of elections. County officials have a duty to comply with these statutes. *See, e.g.*, A.R.S. § 12-2030(A) (civil relief appropriate where an officer of a political subdivision of the state fails to perform a legal duty).

Providing for recognized political parties to exercise such oversight functions comports with the state’s “indisputably . . . compelling interest in preserving the integrity of its election process.” *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 1024, 103 L.Ed.2d 271, 287 (1989). It also serves the “vital” legislative purpose of reinforcing public confidence in public officials. *Jennings v. Woods*, 194 Ariz. 314, 316-17, 982 P.2d 274, 276-77 (1999). Vesting such third-party oversight rights in political parties comports with these objectives because political parties are well resourced actors, with deep bodies of institutional knowledge concerning the elections process, that nonetheless have interests distinct from those of both the government and elected officials. *See e.g., Ariz. Libertarian Party, Inc. v. Bd. of Supervisors*, 205 Ariz. 345, 347, 70 P.3d 1146, 1148 (App. 2003) (“A precinct committeeman serves the interests of his or her political party and is not a public officer at all.”). While elected officials may be expected to be primarily concerned with the outcome of their own elections and those of their allies, political parties are more generally concerned with protecting the voting rights of their members. Because political parties are partisan organizations governed by their most dedicated, grassroots, members, *see* A.R.S. §§ 16-821-16-828, their respective partisans

have confidence that their party is “on their side” and will make use of their privileges, resources, and expertise to guard and advocate for the interests of their members. Just as our court system gains a reputation for fairness among all litigants from the participation of attorneys who serve as advocates in an adversarial process, so too does political party participation in the elections process have the potential to foster increased confidence in that system. Conversely, blocking political parties from exercising their statutory rights to conduct oversight on behalf of their members aggravates the atmosphere of distrust that the County has fostered over the past year through their own misconduct and lack of transparency.

II. The statutory rights of political parties to oversee the County’s audit have been violated.

The County’s audits are taking place at Maricopa County’s “counting center” (“MCTEC”).¹ The law could not be more clear: “All proceedings” at the counting center “shall” be conducted under the observation of representatives of each political party. A.R.S. § 16-621(A).² While “up to three additional people” representing other groups or

¹ See <https://www.fox10phoenix.com/video/896383> (reporting that audit is taking place at Maricopa County Elections Department), <https://recorder.maricopa.gov/elections/> (Elections Department located at MCTEC).

² The complete text of A.R.S. § 16-621(A) is as follows: “All proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual issued pursuant to section 16-452 under the observation of representatives of each political party and the public. The proceedings at the counting center may also be observed by up to three additional people representing a candidate for nonpartisan office, or representing a political committee in support of or in opposition to a ballot measure, proposition or question. A draw by lot shall determine which three groups or candidates shall have representatives participate in the observation at the counting center. Persons representing a candidate for nonpartisan office or persons or groups representing a political committee in support of or in opposition to a ballot measure, proposition or question, who are interested in participating in the observation, shall notify the officer in charge of elections of their desire to be included in the draw not later than seventeen days before the election. After the deadline to receive submissions from the interested persons or groups, but prior to fourteen days before the election, the county officer in charge of elections shall draw by lot, from the list of those that expressed interest, three persons or groups and those selected shall be notified and allowed to observe the proceedings at the counting center. If a group is selected the group may alter who represents that group for different days of observation but on any given observation day a selected group shall not send more than one observer. A group may rotate an observer throughout the day. Only those persons who are authorized for the purpose shall touch any ballot or ballot card or return. All persons who are engaged in processing and counting of the ballots shall be qualified electors, shall be deputized in writing and shall take an oath that they will faithfully perform their assigned duties. There shall be no preferential counting of ballots for the purpose of projecting the outcome of the election. If any ballot, including any ballot received from early voting, is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged or defective ballot in the presence of witnesses and substituted for the damaged or defective ballot. All duplicate ballots created pursuant to this subsection shall be clearly labeled ‘duplicate’ and shall bear a serial number that shall be recorded on the damaged or defective ballot.”

1 candidates may be selected by lottery to “have representatives participate in the
2 observation at the counting center[,]” “each” political party is entitled to send its own
3 representatives. *Id*; see also Elections Procedures Manual (“EPM”) Ch. 8(III) (“Political
4 party representatives are permitted to observe at voting locations and central counting
5 places[.]”).³

6 Despite the privileged status of political party observers over and above those from
7 other organizations, the County has chosen to allow the League of Women Voters, along
8 with fourteen other individuals, to observe the audit while excluding the representatives
9 of the Republican and Libertarian parties. Exhibits 5 and 6 to Plaintiff’s Complaint. The
10 County has the temerity to cite space considerations for their decision to exclude political
11 party observers. *Id*. (“Of course we would like to involve as many people as possible, but
12 due to COVID-19, limited space, etc. we worked to make sure that we had a broadly
13 representative group in attendance.”). This notwithstanding that the County is legally
14 obliged to allow only political parties⁴ and three other groups or candidates to send
15 observers and it has extended invitations to the League of Women Voters, along with
16 **fourteen** other individuals, to observe the audit but **not** representatives of the political
17 parties.

18 In addition to the general right of political parties to observe “all proceedings” at
19 the counting center, both pre and post-election logic and accuracy testing is to be open to
20 representatives of both political parties and the public. A.R.S. §16-449(A) (pre-election),⁵
21 Election Procedures Manual (“EPM”) (4)(II)(F) (post-election tests subject to same rules).
22 Logic and accuracy testing is part of the scope of work for the County’s audit. Exhibit 1
23 to Plaintiff’s Complaint. The political parties have the right to send observers to observe
24 this process and this right has been denied.

25 ³ Once adopted, the EPM has the force of law. *Arizona Public Integrity Alliance v. Fontes*, CV-20-0253-AP/EL,
26 2020 WL 6495178 (Ariz. Nov. 5, 2020).

27 ⁴ And the public.

28 ⁵ Amicus wishes to make clear that A.R.S. § 16-449 empowers its representatives to participate in the process only as an observer: “The test shall be observed by at least two election inspectors, who shall not be of the same political party, and shall be open to representatives of the political parties, candidates, the press and the public.” Observers have no authority to prevent certification.

No clearer or more pretextual violations of law are imaginable. Like the fox that guards the henhouse, the County is using the pretext of COVID-19 to handpick the individuals who will oversee its audit just like, as discussed below, it defied the Senate's subpoena so it could handpick the companies that would perform the audit in the first place. This is not the way that third-party oversight is supposed to work. These examples alone are sufficient to demonstrate that the County proceeded to act or continues to act contrary to law in denying political parties the right to observe its audit.

III. The County has given the voting public cause to be particularly concerned regarding its handling of elections.

The County's recent conduct with respect to elections has certainly been sufficient to justify public concern justifying scrupulous adherence to the laws governing third party oversight. Earlier this year, the Arizona Supreme Court had to step in to prevent Maricopa County from conducting its general election in an illegal and unconstitutional manner. *Ariz. Pub. Integrity All. v. Fontes*, No. CV-20-0253-AP/EL, 2020 Ariz. LEXIS 309, at *13 (Nov. 5, 2020) ("Because Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy the standard for injunctive relief."). In another such matter, *Arizona v Fontes*, the County's chief elections official illegally printed thousands of extra early ballots and had to be restrained from unlawfully mailing them to registered voters who had not requested one.⁶ In yet another matter, our Superior Court found that "There was credible testimony that [witnesses] saw errors in which the duplicated ballot did not accurately reflect the voter's apparent intent as reflected on the original ballot."⁷

Perhaps the County's most concerning behavior is its conduct concerning the instant audits. On December 15, 2020, the Arizona State Senate ("Senate") issued a subpoena to Maricopa County for various election-related documents, documents, and

⁶ See *State of Arizona ex rel Brnovich v. Fontes*, CV-20-0253-AP/EL, Temporary Restraining Order (Sup. Ct. Ariz. Mar. 13, 2020) ("*Fontes* TRO Order"), available at: https://www.azag.gov/sites/default/files/docs/press-releases/2020/motions/State_v_Fontes_TRO_Certified_Signed.pdf

⁷ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1930>

equipment so that the Senate could conduct an audit of the 2020 election.⁸ Thereafter, the County having refused to produce any of the subpoenaed documents, the Senate brought an action in Superior Court to enforce its subpoena.⁹ Nearly simultaneously, the County brought an action to quash the Senate's subpoena, claiming that the Senate lacked the legal authority to issue the subpoena.¹⁰ Oddly enough for a party that had just availed itself of the Court's jurisdiction over the matter by filing its own action, the County defended against the Senate's action by claiming that the Court lacked jurisdiction.¹¹ In addition, the County claimed that the Senate was not entitled to the items sought in the subpoena¹² even though it had just defended against a prior action by Republican Party officials seeking production of many of the same items by claiming the County had to have those materials available to produce to the Legislature. Maricopa County's Motion to Dismiss [*Bowyer v Ducey*] 7:6-23 (2:20-cv-02321-DJH Document 36).

The Senate's case was subsequently dismissed and refiled in slightly modified form as a counterclaim in a consolidated action.¹³ The Attorney General's office then filed an amicus brief arguing that the subpoena should be enforced.¹⁴ Subsequently, the Court ruled that that the issue was moot as a new legislative session had begun and the original subpoena had been issued by the previous legislature – it noted that a new subpoena had been issued by the current legislature and that the parties owed it to the people of Arizona to attempt to work the matter out before coming back to Court over the new subpoena.¹⁵

Thereafter, the parties appeared to be on the path to reach a resolution, with the County expressly acknowledging in a press release that its authority was derived from the Legislature and that the Legislature had the power to issue the subpoena. **Exhibit A.** However, upon learning that one of the auditors the Senate was considering using

⁸ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2032>

⁹ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2032> ¶ 33.

¹⁰ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1990> ¶ 61.

¹¹ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2071>

¹² <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=1990> ¶¶ 57-155.

¹³ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2101>

¹⁴ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2117>

¹⁵ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2163> p 7.

employed a subcontractor that the County did not like (because it viewed the subcontractor as too favorable to Republicans), the County ceased negotiations with the Senate and began the instant audit, the first of two it plans to conduct, using its own preferred auditors. **Exhibit B.** It then shifted positions once again and availed itself of the Court’s jurisdiction, filing a new complaint asking the Court to prevent the Senate from holding it in contempt.¹⁶

The Senate then took a vote as to whether to arrest the Maricopa County Board of Supervisors for failing to comply with the audit which failed on the vote of the lone dissenting Republican, Senator Paul Boyer, who stated he wished to give the parties more time to work things out before resorting to contempt. **Exhibit C.** As a rationale for his decision, Senator Boyer stated that his friendship with the members of the Maricopa County Board of Supervisors, overrode the “need of justice[.]” **Exhibit D.** This is a concrete example of how political parties and elected officials, even of the same party, can have divergent interests. In this case the elected official, Senator Boyer, was concerned with his individual political relationships instead of the interests of the Republican Party’s membership as a whole in election integrity.

In the meantime, the County’s own audit has proceeded. What little Republican activists have been able to observe from the livestream of the audit gives cause for concern, with reports of data appearing to be imported and exported to and from the tabulation machines. On February 1st, the Chairwoman of the Maricopa County Republican Committee, Mickie Nieland, made a written request for the Republican Party to have an observer present at the audit, which, like the request made by the Libertarian Party, was unlawfully denied. **Exhibit E.** This despite the County’s assurance that political party observers were invited to attend. Exhibit 4 to Plaintiff’s Complaint. These concerning events underscore the need for preliminary injunctive relief before yet more damage to public confidence is done.

¹⁶ <https://www.clerkofcourt.maricopa.gov/Home/ShowDocument?id=2185>

IV. Conclusion.

This Court should enforce the law and immediately grant the Libertarian Party's request for injunctive relief before the audit proceeds any further and public confidence in the County's administration of elections is further eroded.

RESPECTFULLY SUBMITTED this 12th day of February, 2021

By /s/Alexander Kolodin

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I CERTIFY that a copy of the forgoing will be served upon the parties to this matter in conformity with the applicable rules of procedure.

/s/Christopher Viskovic